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Ms. Ann E. Goode
Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Ms. Goode:

Chevron is pleased to submit the following comments on the EPA's *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* (Draft Recipient Guidance) and *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (Draft Revised Investigation Guidance), published at 65 Fed. Reg. 39,650, June 27, 2000.

Chevron is one of the world's largest integrated petroleum companies and is involved in every aspect of the industry, from exploration and production to transportation, refining and retail marketing, as well as chemicals manufacturing and sales. Chevron is active in more than 100 countries and employs about 31,000 people worldwide. One of the fundamental approaches we take in conducting our business is to protect people and the environment. Virtually all of Chevron's producing, manufacturing and transportation facilities require environmental permits in order to conduct their operations. Thus, the *Draft Recipient Guidance* and *Draft Revised Investigation Guidance* are of significant interest to Chevron.

We believe the *Draft Revised Investigation Guidance* represents a substantial improvement over EPA's 1998 *Interim Guidance* and would like to commend EPA for engaging in a process that sought much broader stakeholder input, including informal meetings, the Title VI FACA and meetings facilitated by Keystone. This enhanced effort to obtain input from affected stakeholders has contributed markedly to an improved work product from EPA. Similarly, the inclusion of the *Draft Recipient Guidance* represents a positive step in that it attempts to educate State and Local environmental agencies that are recipients of EPA financial assistance with regard to the types of factors that will be considered in determining whether a violation of Title VI has occurred.

In particular, we applaud the EPA's policy choices on the following issues:

- The preservation of the analytical framework underlying EPA's *Select Steel* decision: if there is not an adverse impact, there cannot be a finding of noncompliance under Title VI.
- Focusing the scope of the investigation on adverse disparate impacts resulting from sources and stressors within the State's authority when determining whether the State is in violation of Title VI.
- The explicit recognition that neither the filing of a Title VI complaint nor the acceptance of one for investigation stays an otherwise valid permit, although the operational and financial risks of operating under a permit that has been challenged are considerable.
- The effort to incorporate risk-based principles into the adverse impact decision.
- The beginning of at least some acknowledgment that investigations should focus *not* on individual permits, but on permitting programs to ensure compliance with Title VI. In particular, we support EPA's observation that "it will be a rare situation where the permit that triggered the complaint is the sole reason a discriminatory effect exists; therefore, denial of the permit at issue will not necessarily be an appropriate solution."
- The expanded opportunities for State agencies to respond to Title VI concerns and justify their permitting decisions.

Despite these improvements, we must point out that numerous issues of concern remain unresolved and that both *Guidance* documents still suffer from deficiencies that must be remedied before they are issued in final form. In general, we are concerned that the process set forth in the *Guidance* fails to address the underlying problem of discrimination in a systematic manner and at a broader, more sweeping level through focus on State permitting programs in their entirety, rather than permit by permit.

The revised *Guidance* does seem to recognize that individual permit decisions are poor mechanisms for addressing larger scale issues of discrimination, yet it does not go far enough in acting on this realization. Instead, the process EPA is proposing remains a haphazard one that operates in a reactive fashion after States have already issued permits. This is especially troubling with regard to environmental programs EPA has delegated to States. Where this is the case, EPA has already recognized the authority of States to implement specific environmental programs. If there are Title VI problems with the implementation of an environmental program, then EPA should assume authority over the program rather than questioning State decisions after the fact.

We have significant overall concern with the *Recipient Guidance's* placing such a premium on successfully concluding an "area-specific agreement" that businesses may have no choice but to accede to the demands of community and environmental groups in the hope that these groups will be placated and the State agency (as well as the business) will then be less likely to be involved in a future Title VI complaint.

We also must conclude that the *Investigation Guidance* still confronts those seeking environmental permits with an administrative scheme that lacks certainty, predictability, fairness and finality. By creating a climate where environmental permits properly issued by State or Local agencies are subject to challenge and may be modified over one year after they have been

approved, EPA's *Investigation Guidance* puts businesses in a situation where capital investment and project management decisions are at the mercy of virtually any person or group who chooses to allege a violation of Title VI. We respectfully submit that both the *Recipient Guidance* and the *Investigation Guidance* require substantial modification before final issuance. Our specific concerns are expressed below.

1. The concept of area-specific agreements is fraught with so many problems that it will not be an effective tool to address Title VI concerns.

EPA's vision seems to be that if affected stakeholders sit down in advance of a permitting decision and work through potential Title VI issues, reach some consensus on how to eliminate or reduce Title VI concerns and then follow through on those agreements, Title VI concerns will be alleviated. In fact, EPA places so much stock in this approach that they are willing to give some "due weight" to permits issued where an area-specific agreement is in place. We believe there are numerous problems with the concept of area-specific agreements.

First, by dangling the carrot of "due weight," EPA is essentially forcing businesses to reach an area-specific agreement in an effort to protect their permits. This creates a situation ripe for exploitation by community or environmental groups that, in a given situation, may wish to extract concessions from the business. Such groups will have inordinate bargaining power and leverage in any sort of discussion regarding the agreement and may require almost unlimited types of mitigation activities as the price for an agreement.

Second, the protection offered by area agreements is illusory. Community and environmental groups may have an incentive *not* to reach an area-specific agreement. By failing to agree, these groups leave the door open to later file a Title VI complaint if they disagree with the State's permitting decision. Moreover, even if an agreement were to be reached between area residents, the agency and the facility, there is nothing to prevent outside groups with their own agendas from filing a Title VI complaint and alleging that since they were not party to the agreement, they are not bound by its terms or barred from raising additional concerns. Recognizing that these agreements afford so little protection from Title VI complaints, facilities will seldom find it in their best interests to reach such agreements.

Third, current permitting processes have many opportunities for public participation. These processes are designed to allow interested persons to provide input to the permitting process on the front-end, in advance of the permit decision. There seems to be no reason why Title VI-related concerns cannot be brought up at the same time other issues are considered, *prior* to the decision to grant or deny the permit. That way, allegations of discrimination can be resolved early on in the process.

Finally, by encouraging States to identify geographic areas where adverse disparate health impacts or other potential Title VI concerns may exist, EPA is inviting States to effectively "redline" particular communities in advance. The existence of such agreements will stigmatize the community as a "problem area." The consequences will be reduced property values for businesses and residents, a disincentive for new businesses or residents to locate in that community and discouraging investments in infrastructure that might actually lead to an improvement in the quality of life in communities of concern. It is hard to believe that cities and states will support this concept.

2. Standing to file complaints is unnecessarily broad, inviting complaints from third parties with no legitimate stake in a community.

Chevron has real concerns with the broad standing to file a complaint that is included in the *Investigation Guidance*. While we do not question the standing of a person or a member of a specific class of protected persons who was allegedly discriminated to file a Title VI complaint, we are concerned about allowing a party that is "authorized to represent a person or specific class of people who were allegedly discriminated against in violation of EPA's Title VI regulations" to file complaints. 65 Fed. Reg. 39,672.

It is not at all clear what is meant by the phrase "authorized to represent." Is this a concept akin to legal standing? If so, EPA should clarify and justify the rationale. The larger concern about this broad language is that it fails to require that a Title VI complainant be a person with a legitimate stake in the community. In fact, the language of the *Investigation Guidance*, is so broad that third parties or outside groups with no members in a community could file a complaint about a local facility, whether or not they are members of a Title VI protected class. Virtually anyone could be "authorized to represent" a community. Moreover, what does it mean to "represent" the community? Is it sufficient that a single member of the community authorizes the person or must there be some significant segment of the community represented before the criteria are met?

Chevron recommends that EPA remove the statement in the *Investigation Guidance* that "a party that is authorized to represent a person or specific class of people who were allegedly discriminated against in violation of EPA's Title VI regulations" can bring a Title VI complaint. At a minimum, EPA should provide an explanation and legal justification for granting standing to file complaints to persons who have suffered no discrimination themselves, but who purport to "represent" the victims of alleged discrimination.

3. EPA should provide a formal role for businesses in the Title VI complaint and investigation process.

The investigation process described in the *Investigation Guidance* is fundamentally flawed in that it does not provide a formal role for the business that owns and operates the facility in question. In fact, there are few references to business interests in the *Guidance*, ignoring the reality that the business owner has a tremendous stake in the outcome of a complaint and investigation affecting its ability to operate the facility in question.

EPA is well aware that the business owner naturally has a viable, legitimate interest in any proceedings relating to its facility. In reality, States often turn to business owners to assist in the defense of the State's permit decision by providing information that helps demonstrate the lack of any significant adverse disparate impact, or that helps establish the justification for the impact. EPA tacitly recognizes the crucial role of the business owner in its *Recipient Guidance* where it acknowledges that "affected stakeholders" include "owners of facilities" and that those facility owners could be part of a group working to eliminate or reduce alleged adverse impacts in a given area. 65 Fed. Reg. 39,657. Given the real-world context where Title VI concerns could arise, there is clearly a formal role for the business owner in this process and EPA should explicitly recognize such a role.

Beyond fundamental fairness, there is another good reason for involving the business owner. Without his or her participation, EPA would likely be limiting the effectiveness of its investigation by leaving out the party with the most current and accurate data regarding facility emissions, installed and potential available emission control technologies, and the effectiveness of these measures in mitigating Title VI concerns.

4. The timeframes during which Title VI complaints may be filed are unnecessarily lengthy and open-ended, creating tremendous uncertainty for business owners.

The timelines set forth for investigation and resolution of Title VI complaints remain too uncertain and open-ended to provide any reasonable degree of certainty to business owners regarding the validity of duly issued permits. For example, the *Investigation Guidance* indicates that complaints may still be filed 180 calendar days after issuance of a permit. In addition, the 180-day limit can be waived for "good cause." We believe it is simply unacceptable that a situation could result where a permit is issued, the business owner invests financial and human resources in reliance on being able to operate according to the terms of the permit and then the validity of the permit is called into question six months or more after being issued. We recommend that EPA shorten the allowable timeframe for filing Title VI complaints and remove the "good cause" waiver so that duly-issued permits are not called into question long after businesses have acted in reliance on those permits.

We request clarification of the timeframes EPA lays out for issuance of its preliminary findings. 65 Fed. Reg. 39,670. The *Investigation Guidance* indicates that if EPA accepts a complaint for investigation, the Agency will first attempt to resolve it informally. If informal resolution fails, EPA will then conduct a factual investigation to determine if there has been a violation of Title VI. The *Guidance* indicates that EPA will notify the State of preliminary findings "within 180 calendar days from the start of the complaint investigation. However, the *Guidance* and accompanying flow chart leave it unclear whether the "start" of the complaint investigation is the date the complaint is accepted or the date that informal resolution of the complaint fails. If it is the latter, there is additional uncertainty as to timing since informal resolution efforts could go on for an unspecified period of time. We urge EPA to clarify this point in the final version of the *Guidance.*

Finally, we must question EPA's assertion that it will notify States of preliminary findings "within 180 calendar days from the start of complaint investigation." 65 Fed. Reg. 39,670. This is unrealistic given EPA's track record to date where some complaints accepted for investigation have been pending for nearly seven years. If EPA is serious about making preliminary determinations in 180 days, there should be consequences for failure to meet the deadline. We suggest that where EPA fails to reach a preliminary decision within the prescribed timeframe, the Title VI complaint be dismissed.

5. EPA should be more explicit about the limitations of the data sources it cites for possible use in disparate impact assessments, and clearer about the criteria for establishing the data's relevance in a specific case.

In spite of statements regarding use of the most relevant data and EPA's admonition that the lists of data sources is not all inclusive, the mere citation of these sources in the *Guidance* documents creates a presumption that they are suitable for use in stressor analysis. The databases cited were not necessarily designed for the purposes of conducting the kind of detailed cumulative risk assessments that may be necessary to resolve Title VI complaints.

For example, TRI data do not include source characterization information such as location and stack height, which could be required for dispersion modeling. TRI inventories also group some compounds into categories for reporting purposes e.g., Nickel compounds. For purposes of risk assessments, it may be necessary to model these compounds separately since the potencies vary considerably. Another data set cited, the National Air Toxics Assessment, carries the following caveat: "EPA strongly cautions that these modeling results should not be used to draw conclusions about local concentrations or risk." However it just that kind of conclusion that may be required to resolve complaints.

Each of the data sources cited may be useful at some level, particularly in screening or focusing further investigation. However, Chevron is concerned that States will by default have to use less than suitable data and leave the burden of rebutting the presumption that they are acceptable to the permit holder named in the complaint. EPA should strengthen the *Guidance* by more fully exploring data relevance and quality issues and insist on validation of data used in assessing Title VI complaints.

6. <u>EPA should clarify that where cumulative impacts from multiple facilities are causing alleged discriminatory effects, a single business will not be forced to mitigate multiple impacts.</u>

One of the most widespread criticisms of EPA's decision to consider cumulative effects in the adverse disparate impact analysis was the possibility that a single business could be forced to mitigate impacts from multiple facilities simply because that businesses' permit was up for renewal. Our reading of the revised *Investigation Guidance* suggests that EPA has failed to address this concern. In fact, we can find no substantive discussion of the potential problems surrounding this situation anywhere in the *Guidance*.

We do take some solace in EPA's comment that "it will be a rare situation where the permit that triggered the complaint is the sole reason a discriminatory effect exists; therefore, denial of the permit at issue will not necessarily be an appropriate solution." However, EPA goes on to state "efforts that focus on all contributions to the adverse disparate impact, not just the permit at issue, will likely yield the most effective long-term solutions. 65 Fed. Reg. 39,700. While it is difficult to find fault with this latter statement, it does leave a great deal of uncertainty as to what mitigation measures will be required where cumulative impacts are the cause of an adverse disparate impact but only one facility's permit has been challenged. EPA needs to shed further light on what can be expected in these situations and state unequivocally that a single business will not be expected to mitigate impacts caused by multiple facilities.

7. <u>EPA should not require mitigation measures that could have the effect of increasing the stringency of underlying environmental standards.</u>

As one of its recommendations on how States can avoid Title VI violations, EPA suggests that they undertake measures to "reduce or eliminate alleged adverse disparate impacts." EPA indicates that States can propose various types of mitigation, including measures narrowly tailored toward sources under existing permitting authorities. However, EPA also suggests that State agencies can "propose broader remedial measures that are outside those considerations ordinarily considered in the permitting process." 65 Fed. Reg. 39,662. Among the remedial measures EPA lists are emission offsets and caps for geographic areas of concern.

First, we are troubled by what is meant by "remedial measures that are outside those considerations ordinarily considered in the permitting process." It appears EPA is inviting State and Local permitting agencies to exceed the bounds of their authority and impose mitigation measures that could cover activities with little, if any, environmental connection. It also poses a legal concern for States that will naturally be reluctant to require mitigation measures that could well be outside their legal jurisdiction.

Second, we are concerned that the implementation of emission offsets or caps could have the effect of increasing the stringency of underlying environmental standards by forcing facilities to undertake emission reduction efforts in excess of what they are otherwise legally obligated to do. An example illustrates the point. Consider a scenario where industrial facilities in a community of concern are in compliance with all environmental standards. Nevertheless, there is a finding of adverse disparate impact due to cumulative effects or discriminatory impacts of policies that are neutral on their face. As a solution to reducing or eliminating the problem, the agency requires facilities to implement declining emission caps. Such a cap may not be authorized by any individual environmental statute or regulation with which the facility must comply, but is being imposed for the sole purpose of rectifying a Title VI concern. We believe such a cap could be beyond the statutory or regulatory authority of the agency that imposed it, thereby making the agency vulnerable to legal challenge.

8. <u>Substantial problems remain with the techniques proposed for identifying affected populations and comparison populations and with the methodologies used to determine if there is a disparate impact.</u>

As part of the disparate impact analysis, EPA indicates that it will identify an "affected population," and then conduct an analysis to determine whether a disparity exists between the affected population and "an appropriate comparison population in terms of race, color, or national origin, and adverse impact." 65 Fed. Reg. 39,681. We have concerns with the methodologies proposed used to identify both the affected population and the comparison population.

EPA indicates that the affected population is that which suffers the adverse impacts of the stressors from the sources in question. The Agency says it will use mathematical models, when possible, to estimate the size and location of affected populations. This is fine as far as it goes and we support the emphasis on use of scientific tools to estimate impacts. However, EPA goes on to suggest that if detailed estimates cannot be developed, the Agency will rely on "simpler approaches primarily based on proximity." 65 Fed. Reg. 39,681. One example cited is the use of circles of impact for air releases which assumes those located closest to the source experience the greatest impact. The problem with these simplified approaches is that they run the risk of badly mis-characterizing the emissions from a facility and the impact of the emissions, if any, on the

affected population. Throwing out the effect of meteorology and actual exposure assessments in favor overly simplified assumptions will introduce a very troubling bias into the analysis. We urge EPA to require scientifically based exposure assessments as part of the impact analysis.

There is also a troubling lack of precision with regard to how the comparison population is selected so that an assessment of disparity can be done. EPA notes that the "appropriate" comparison population could be drawn from reference areas such as the recipient's jurisdiction, some political jurisdiction or even an area defined by environmental criteria such as an airshed or watershed. Given that these areas could range from a neighborhood to an entire state, how can businesses (and States, for that matter) know in advance whether or not facility operations raise potential Title VI compliance problems?

Finally, EPA's Science Advisory Board (SAB) provided a critique of the methodologies that could be used to conduct a disparate impact analysis. One of these techniques, "relative burden analysis," (RBA) estimates differential burdens to various populations from air emissions from stationary point sources. It was employed by EPA in its analysis of the Title VI complaint in the *Shintech* case. As the SAB pointed out, there is a fundamental problem with the RBA approach because of its inability to extrapolate from the toxicity-weighted exposure of one population in a given area divided by the toxicity-weighted exposure of a second population in the same area, to potential harm or risk.

Why is this relevant? As the SAB points out, simply demonstrating that different populations experience different levels of exposure to risk does not deal with the question of whether those risks are significant. Noting that "the issue of *de minimis* risk cannot be addressed without risk-based analyses," the SAB urged EPA to refine the tools to make meaningful comparisons. *An SAB Report: Review of Disproportionate Impact Methodologies*, US EPA, December 1998.

Despite this criticism, the revised *Investigation Guidance* once again cites the *Shintech*-type of RBA as the type of demographic analysis that EPA will use to compare an affected population to a comparison population. 65 Fed. Reg. 39,681, footnote #134. We urge the EPA to remove references to these methodologies in the final version of the *Investigation Guidance.*

9. The *Recipient Guidance* effectively imposes an unfunded mandate on States.

EPA recommends a number of approaches that States can follow to address Title VI-related claims and issues that may arise in the environmental permitting context. While indicating that States need not adopt these approaches, EPA provides incentive for them to do so by indicating that outcomes from these approaches "may be considered" by EPA in the analysis of Title VI complaints. 65 Fed. Reg. 39,656. Some of these approaches, e.g., the "comprehensive approach" and "area-specific approach" could be highly resource-intensive efforts requiring substantial changes in States' permitting programs. Moreover, several of the activities EPA recommends could also entail significant resources, including staff training, and conducting adverse impact and demographic analyses.

While admitting that States may have different amounts of resources available to address Title VI issues, EPA offers no federal financial assistance to States that could be used to improve their permitting programs. We believe many States will identify this lack of federal financial support as yet another "unfunded mandate" that they will find difficult, if not impossible, to implement. The end result in States which are unable to follow the approaches suggested by EPA will be increased vulnerability to Title VI complaints and a greater likelihood that permits issued under State programs will not survive challenge.

We are also concerned that States lack the resources to effectively implement the *Investigation Guidance*. Without adequate resources, States will be unable to meet the high threshold for data requirements to justify their permitting decisions in response to a Title VI complaint. Conceivably, this lack of resources could lead to complaints languishing for a lengthy period of time without receiving adequate attention. Without additional resources, States will not be able to conduct the types of data analyses required by the *Guidance*.

EPA's contention that it is issuing the *Recipient Guidance* as a non-binding policy statement, meaning that it is not subject to The Unfunded Mandates Reform Act of 1995 is not persuasive. Whether the *Guidance* meets the statutory definition of an unfunded mandate does not change the fact that EPA is forcing States to make potentially thoroughgoing changes to their environmental permitting programs in an effort to avoid Title VI problems. It also does not change the fact that State agencies will evidently receive no federal grants or other financial assistance to aid in making EPA's suggested revisions.

10. The *Recipient Guidance* fails to grant sufficient deference to permitting decisions made by State and Local environmental agencies.

A common theme in comments submitted to EPA on the *Interim Guidance* in 1998 was that the Agency failed to give sufficient weight to permitting decisions made by States. The *Recipient Guidance* contains the same flaw. EPA argues it cannot delegate its Title VI enforcement authority to States. While this point is debatable, it is not a convincing rationale for denying "due weight" to State permitting decisions except in the most limited of circumstances. The two examples cited by EPA where due weight might be appropriate are where States submit analyses supporting their position that an adverse disparate impact does not exist, or where an area-specific agreement is in place. 65 Fed. Reg. 39,653. This is far too limited and will result in EPA almost never giving due weight to State permitting decisions. Resource constraints as discussed above will often prevent State agencies from conducting the sort of extensive disparate impact analysis EPA seems

to be demanding here. Moreover, the area-specific agreement approach is so fraught with problems that we do not believe it is a viable means of addressing Title VI concerns (see section 1 above).

We believe EPA must expand the circumstances under which State permitting decisions receive deference from the Agency. In particular, where a State agency has a program in place to address Title VI concerns or has undertaken an "environmental justice" review prior to issuing the permit, EPA should not second-guess the permit decision by engaging in *de novo* review. Doing so is a waste of both State and EPA resources and may actually discourage States from revising their permitting programs to address Title VI concerns. If EPA wants to encourage States to address Title VI concerns upfront, it should provide incentives to do so by recognizing strong State and Local programs and immunizing permits issued under those programs from further review.

Finally, we believe EPA should expand the instances where investigations into allegations of discriminatory effects are closed without completing the entire proposed investigation process. In its description of the adverse disparate impact analysis, EPA indicates that there are two situations where the Agency will likely close its investigation at an early stage: where the permit action that triggered the complaint significantly decreases overall emissions at the facility and where the permit action significantly decreases all pollutants of concern named in the complaint. 65 Fed. Reg. 39,677. In addition to these situations, EPA should close its investigation where a pollution control project creates temporary and short-term emission increases but results in overall emission decreases over time.

A classic example of such a situation would remediation at a Superfund site. Depending on the remediation technique that is used, there could be temporary and short-term emission increases while the remediation is taking place. However, when remediation is complete, there should be a net reduction in the level of stressors impacting public health and the environment. If a State agency or business can make this showing in response to a Title VI complaint, EPA should dismiss the complaint.

11. Permits being reopened solely due to new legislative or regulatory requirements should receive streamlined and/or expedited Title VI review.

EPA should also either defer to State permitting decisions or, at a minimum, provide expedited Title VI review in instances where a permit modification is necessary to comply with new legislative or regulatory requirements. An example is EPA's recently issued Tier 2/Gasoline Sulfur rule. Many refineries will require permit modifications to allow changes at their facilities to meet the new low sulfur mandate. These permits will need to be issued in very compressed timeframes in order to meet EPA's compliance deadlines. Recognizing that the only reason the permit is being reopened is in response to the new regulatory requirements, EPA should grant due weight to State decisions to issue these permits. In the event a Title VI complaint is filed alleging that issuance of these permits is discriminatory, EPA should engage in a fast-track review to ensure an expedited preliminary finding is made on the merits of the Title VI complaint so that ultimate compliance with the new rule's regulatory requirements is not compromised.

We appreciate your consideration of Chevron's comments on the *Guidance*. If you have questions, please contact Judy Blanchard in Washington, D.C. at (202) 408-5831. You may also contact Michael Steinbrecher of our San Ramon, CA office at (925) 973-4475.

Sincerely,